

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-653

August 2, 2001

CENTRAL MAINE POWER COMPANY
Request for Commission Investigation
Regarding the Plans of Boralex Stratton Energy, Inc.
to Provide Electric Service Directly from
Stratton Lumber Company

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order, we deny Central Maine Power Company's (CMP) motion for reconsideration.

II. BACKGROUND

On April 6, 2001, we issued an Order declining CMP's request for an investigation regarding Boralex Stratton Energy's (Boralex) plan to provide electric service to Stratton Lumber Company. We concluded, based on the pleadings, that Boralex's planned activity would not make it either a transmission and distribution (T&D) utility or a competitive electricity provider (CEP) and, therefore, a formal investigation was not warranted.

On April 26, 2001, CMP filed a motion requesting that the Commission reconsider its decision based on the provisions of 35-A M.R.S.A. § 3305(2). CMP argues that the plain language of these provisions prohibits Boralex from providing electric service to Stratton Lumber. According to CMP, section 3305(2) allows Boralex to generate and distribute electricity only for its own use, the use of its tenants, or the use of its associates. Because Stratton Lumber is neither a tenant nor associate of Boralex, CMP asserts that Boralex is statutorily prohibited from providing electric service to Stratton Lumber. CMP argues for reconsideration, stating that it raised the applicability of section 3305(2) during a Commission hearing on this matter, but that the Commission's Order does not address the issue.

On May 14, 2001, Boralex filed comments, arguing that the Commission should deny CMP's motion for several reasons. These are:

- CMP's submission is not a proper motion for reconsideration in that it asks the Commission to find that Boralex is prohibited from providing electric service rather than requesting a reconsideration of the denial to initiate the requested investigation;

- the Commission considered and rejected CMP's section 3305(2) argument during the hearing held on this matter;
- the plain language of the statute does not prohibit the Boralex sales; rather, the section provides qualifying facilities (QF) with specified authority independent of any prohibitions or grants of power contained in Maine law;
- section 3305(2), by using the word "may," is a purely permissive provision that does not prohibit any activity;
- any conclusion that section 3305(2) restricts QFs from activities that other similarly situated generators may engage in is discriminatory and would thus be preempted by PURPA and a violation of the equal protection clauses of the Maine and federal constitutions;
- CMP's argument is in conflict with Maine's Restructuring Act which removed Commission regulation of generation service not delivered across a T&D utility; and
- the statute does not apply because Stratton Lumber is an "associate" of Boralex within the meaning of the section in that it supplies biomass for the production of electricity and participates in a comprehensive and on-going plan of development and operation.

III. DISCUSSION

A. Preliminary Issues

At the outset, we discuss the propriety of CMP's motion with respect to the timing in which it has made its section 3305(2) argument. This proceeding was initiated by a CMP petition for an investigation regarding Boralex's plans to provide electric service to Stratton Lumber. In its petition, CMP argued that Boralex's would be acting as both a T&D utility and a CEP without proper Commission authority. Boralex filed a response to the CMP petition and CMP filed a reply to the Boralex response. The Examiner issued an Examiner's Report and both parties submitted exceptions to the Report. Subsequently, the Commission decided to hold an oral argument on the issues presented in this proceeding. It was during this oral argument that CMP first stated its position that section 3305(2) prohibits Boralex's provision of service to Stratton Lumber.

Substantive arguments on issues should not occur for the first time at an oral argument held after an Examiner's Report has issued and exceptions have been submitted. CMP's section 3305(2) argument is, therefore, untimely and we could deny the motion on this basis. However, the language of section 3305(2) does raise serious issues of interpretation regarding the circumstances in which entities may provide

electric services without prior Commission authorization. Because the matter is of general importance, we will exercise our discretion and address the merits of CMP's argument.

Before proceeding to a discussion of the merits, we address Boralex's position that the Commission has already considered and rejected CMP's section 3305(2) argument. Boralex raises two points in support of its position: 1) the comments of a single Commissioner made during the oral argument, and 2) notions of judicial economy resulted in the absence of a discussion of the issue in the Order. With respect to the first point, we emphasize that the comments of a single Commissioner in any context can never constitute a decision of the Commission. Commission decisions on disputed litigated issues are by vote of the Commissioners in open deliberative session. See *Order on Reconsideration*, Docket No. 97-580 at 14 n.5 (June 22, 1999) (individual Commissioner statements do not constitute Commission action). Regarding the second point, as a general matter, the Commission addresses all disputed issues in written orders; it would be extremely rare for the Commission to consciously reject an argument through silence. The lack of any discussion of the section 3305(2) issue in our Order was not based on any notion of judicial economy, but resulted from the issue being raised only through a single statement made during a relatively lengthy oral argument.

Finally, we reject Boralex's argument that CMP's submission is not a proper motion for reconsideration on the grounds that it asks for a finding that Boralex is statutorily prohibited from providing service, rather than seeking reconsideration of the decision to deny the requested investigation. Although Boralex is correct that CMP's initial petition in this proceeding was a request for an investigation, its argument places form over substance. The essence of CMP's petition was that Boralex planned to provide electric service in violation of statute. The motion presents only a legal question of statutory interpretation that is directly on point to the issues in this proceeding. Accordingly, the motion should not fail simply because it does not ask for the initiation of an investigation.

B. Section 3305(2)

For the reasons discussed below, we conclude that section 3305(2) does not prohibit Boralex from providing electric service to Stratton Lumber and we therefore deny CMP's motion for reconsideration.

Section 3305(2) was enacted as part of the State's Small Power Production Act (SPPA). P.L. 1979, ch. 421. The SPPA (which mirrors to a large extent the federal PURPA) was enacted in 1979 for the purpose of promoting the production of electricity from small renewable resource facilities and through the cogeneration of power. 35-A M.R.S.A. § 3302. To accomplish its purpose, the SPPA exempted specified activities of small power producers and cogenerators (collectively QFs) from regulation as public utilities and required utilities to purchase electricity from these producers. To a large degree, the SPPA was rendered obsolete by the restructuring of

Maine's electric industry and, accordingly, many of its provisions were repealed effective March 1, 2000. P.L. 1999, ch. 398.

Section 3305(2) was one of the provisions of the SPPA that was not repealed. The section states:

Use of electricity by the producer. Any small power producer or cogenerator may generate or distribute electricity through his private property solely for his own use, the use of his tenants or the use of, or sale to, his associates in a small power production or cogeneration facility and not for the use of or sale to others without approval or regulation by the commission.

A reading of the language of this section would appear to support CMP's position that Boralex (a small power producer as defined by the SPPA) may not sell or distribute electricity to entities other than "tenants" or "associates." However, this reading would produce an anomalous result in that QFs (who are the only entities subject to the section) would be prohibited from engaging in certain transactions without Commission authorization while other similarly situated non-QF generators would not be subject the prohibition. Such an interpretation would be particularly suspect because a primary purpose of the SPPA, as stated above, was to encourage the development of QFs. We therefore go beyond the specific language of section 3305(2) and consider the general purposes of the SPPA in the context of the broader public utility statutes. *See Madison v. Norridgewock*, 544 A.2d 317, 319 (Me. 1988) (statutes should be construed consistent with overall statutory context).

The fundamental purpose of the utility statutes is to ensure safe and adequate utility service at just and reasonable rates. 35-A M.R.S.A. § 101. To accomplish this, the Commission has had broad regulatory authority over public utilities. More recently, as a consequence of electric industry restructuring, the Commission also has regulatory oversight over CEPs. Thus, the Commission's regulatory authority extends only to public utilities and CEPs. In our initial decision in this proceeding, we concluded that Boralex is neither a public utility nor a CEP. CMP's interpretation of section 3305(2) would therefore result in the Commission having approval and regulatory authority over the activities of entities that are not public utilities or CEPs. We find such a result to be inconsistent with the basic context of our governing statutes.

As mentioned, a primary purpose of the SPPA was to specify activities for which QFs would be exempt from utility regulatory requirements in the event that their actions would otherwise subject them to utility regulation. We, thus, concur with Boralex that section 3305(2) was intended to be only permissive in nature in that there is no logic or expressed intent to add restrictions to QF activities that would not otherwise apply to other entities. In this light, we read the concluding language of section 3305(2) not as a restriction, but as a clarification that QFs are not exempted from regulation and

approval requirements regarding the provision of service to “others” to the extent that such regulation would otherwise apply.

Because we deny CMP's motion on the grounds discussed above, we need not address Boralex's other arguments for rejecting the motion.

Accordingly, we

ORDER

That CMP's motion for reconsideration is, hereby, denied.

Dated at Augusta, Maine, this 2nd day of August, 2001.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent

COMMISSIONER DESSENTING: Diamond